

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 17, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VICKIE K.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.

No. 2:20-cv-00347-SMJ

**ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 19, 23. Attorney Daniel Jones represents Vickie K. (Plaintiff); Special Assistant United States Attorney Danielle Mroczek represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the Court grants in part Plaintiff's Motion for Summary Judgment,

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 denies Defendant's Motion for Summary Judgment, and remands the matter to the
2 Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

3 4 **JURISDICTION**

5 Plaintiff filed an application for Disability Insurance Benefits on March 15,
6 2018 alleging disability since August 25, 2016, due to Meniere's disease, major
7 depression, hypertension, panic attacks, and headaches. Tr. 95-96. The application
8 was denied initially and upon reconsideration. Tr. 117-23, 125-30. An
9 Administrative Law Judge (ALJ) held a hearing on August 27, 2019, Tr. 38-70, and
10 issued an unfavorable decision on October 17, 2019. Tr. 15-31. Plaintiff requested
11 review of the ALJ's decision by the Appeals Council and the Appeals Council
12 denied the request for review on July 27, 2020. Tr. 1-5. The ALJ's October 2019
13 decision is the final decision of the Commissioner, which is appealable to the district
14 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
15 September 28, 2020. ECF No. 1.

16 17 **STATEMENT OF FACTS**

18 Plaintiff was born in 1960 and was 56 years old as of her alleged onset date.
19 Tr. 95. She has a GED and attended cosmetology school, though she did not
20 complete her training due to anxiety. Tr. 383. She was in an abusive relationship
21 when she was young and has struggled with anxiety and PTSD symptoms due to her
22 ex-husband's abuse. Tr. 371, 708. She worked for many years as a janitor alongside
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1 her second husband. Tr. 383. She stopped working due to her mental health. Tr. 46,
2 484, 655. She has reported symptoms of OCD ritualistic behaviors, panic attacks,
3 and agoraphobia that keep her largely homebound.
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5 STANDARD OF REVIEW

6 The ALJ is responsible for determining credibility, resolving conflicts in
7 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
8 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
9 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
10 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only
11 if it is not supported by substantial evidence or if it is based on legal error. *Tackett*
12 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
13 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
14 another way, substantial evidence is such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
16 389, 401 (1971). If the evidence is susceptible to more than one rational
17 interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*,
18 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595,
19 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or
20 if conflicting evidence supports a finding of either disability or non-disability, the
21 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
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1 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
2 set aside if the proper legal standards were not applied in weighing the evidence and
3 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
4 432, 433 (9th Cir. 1988).

6 SEQUENTIAL EVALUATION PROCESS

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8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*
10 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant bears
11 the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-
12 1099. This burden is met once a claimant establishes that a physical or mental
13 impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. §
14 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
15 to step five, and the burden shifts to the Commissioner to show (1) the claimant can
16 make an adjustment to other work; and (2) the claimant can perform specific jobs
17 that exist in the national economy. *Batson v. Commissioner of Social Sec. Admin.*,
18 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make an adjustment
19 to other work in the national economy, the claimant will be found disabled. 20 C.F.R.
20 § 404.1520(a)(4)(v).
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ADMINISTRATIVE FINDINGS

On October 17, 2019, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act. Tr. 15-31.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity from the alleged onset date through the date last insured of December 31, 2018. Tr. 18.

At step two, the ALJ determined Plaintiff had the following severe impairments: major depressive disorder, obsessive compulsive disorder (OCD), panic disorder, and posttraumatic stress disorder (PTSD). *Id.*

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 19-20

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found she could perform work at all exertional levels, with the following non-exertional limitations:

The claimant could carry out simple routine tasks in two-hour increments with usual and customary breaks. She could work superficially and occasionally with the general public (where "superficially" means that working with the public would not be the focus of the job). She could work in the same room with coworkers but not in coordination with them. The claimant's work duties could not involve the claimant having to drive to different sites after reporting for the day to a worksite; however, she could travel to different sites if transportation were provided by a third person.

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2 Tr. 20-21.

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4 At step four, the ALJ found Plaintiff was capable of performing her past
5 relevant work as a commercial or institutional cleaner. Tr. 29.

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7 Alternatively, at step five the ALJ found that, considering Plaintiff's age,
8 education, work experience and residual functional capacity, Plaintiff could perform
9 jobs that existed in significant numbers in the national economy, specifically
10 identifying the representative occupations of bagger, industrial cleaner, and page.
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12 Tr. 30-31.

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14 The ALJ thus concluded Plaintiff was not under a disability within the
15 meaning of the Social Security Act at any time from the alleged onset date through
16 the date last insured. Tr. 31.

17 ISSUES

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19 The question presented is whether substantial evidence supports the ALJ's
20 decision denying benefits and, if so, whether that decision is based on proper legal
21 standards.
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23 Plaintiff contends the Commissioner erred by (1) failing to properly evaluate
24 the medical opinion evidence; (2) failing to properly evaluate Plaintiff's testimony;
25 and (3) formulating a flawed RFC.
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DISCUSSION

1. Medical Opinions

Plaintiff argues the ALJ improperly evaluated opinions from Drs. Wertz and Mahler and gave undue weight to the state agency non-examining doctors. ECF No. 19 at 3-9.

For claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must weigh medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The new regulations provide the ALJ will no longer give any specific evidentiary weight to medical opinions or prior administrative medical findings, including those from treating medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ will consider the persuasiveness of each medical opinion and prior administrative medical finding, regardless of whether the medical source is an Acceptable Medical Source. 20 C.F.R. § 404.1520c(c). The ALJ is required to consider multiple factors, including supportability, consistency, the source's relationship with the claimant, any specialization of the source, and other factors (such as the source's familiarity with other evidence in the file or an understanding of Social Security's disability program). *Id.* The regulations make clear that the supportability and consistency of the opinion are the most important factors, and the ALJ must articulate how they considered those factors in

1 determining the persuasiveness of each medical opinion or prior administrative
2 medical finding. 20 C.F.R. § 404.1520c(b). The ALJ may explain how they
3 considered the other factors, but is not required to do so, except in cases where two
4 or more opinions are equally well-supported and consistent with the record. *Id.*

6 Supportability and consistency are further explained in the regulations:

8 (1) *Supportability*. The more relevant the objective medical
9 evidence and supporting explanations presented by a medical
10 source are to support his or her medical opinion(s) or prior
11 administrative medical finding(s), the more persuasive the
12 medical opinions or prior administrative medical finding(s) will
13 be.

14 (2) *Consistency*. The more consistent a medical opinion(s) or
15 prior administrative medical finding(s) is with the evidence from
16 other medical sources and nonmedical sources in the claim, the
17 more persuasive the medical opinion(s) or prior administrative
18 medical finding(s) will be.

19 20 C.F.R. § 404.1520c(c). The Ninth Circuit has additionally held that the new
20 regulatory framework displaces the longstanding case law requiring an ALJ to
21 provide “specific and legitimate” or “clear and convincing” reasons for rejecting a
22 treating or examining doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir.
23 2022).

24 **a. Dr. Wertz**

25 Plaintiff’s treating doctor, Dr. Albert Wertz, completed a medical source
26 statement regarding Plaintiff’s condition in January 2018. Tr. 451-55. He noted
27 diagnoses of major depressive disorder, OCD, panic disorder with agoraphobia, and
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1 PTSD. Tr. 451. He opined that Plaintiff's conditions caused a marked impairment in
2 almost all areas of work-related functions and that she would be likely to miss more
3 than three days of work per month. Tr. 454-55.
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5 The ALJ found this opinion to be unpersuasive, finding it to be out of
6 proportion to Dr. Wertz's exam findings and containing descriptions of behavior that
7 did not appear in his contemporaneous treatment notes. Tr. 27. The ALJ concluded
8 Dr. Wertz appeared to have relied on Plaintiff's self-reports of behaviors. Tr. 27-28.
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10 Plaintiff argues the ALJ's conclusion is contradicted by the record, given the
11 objective findings on exam and the explanations offered by Dr. Wertz. ECF No. 19
12 at 4-5. She further argues that the opinion is consistent with treatment records
13 showing depression, anxiety, abnormal affect, and various other signs and
14 symptoms, which are the gold standard of psychological evidence. *Id.* at 5-6.
15 Defendant argues the ALJ reasonably interpreted the medical evidence and
16 explanations presented, and reasonably concluded the opinion was based on
17 Plaintiff's reports, which were inconsistent with the evidence as a whole. ECF No.
18 23 at 9-10.
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23 The Court finds the ALJ's discussion was insufficient. While the ALJ
24 discussed the supportability factor in referencing Dr. Wertz's exam findings and
25 explanation, she failed to comply with the new regulations when she did not offer
26 any specific discussion of the consistency factor. On remand, the ALJ will reconsider
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1 Dr. Wertz's opinion, specifically articulating how she considered the factors of
2 supportability and consistency in determining the persuasiveness of the opinion.

3 **b. Dr. Mahler**
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5 Plaintiff's treating doctor, John Mahler, completed a medical source statement
6 in July 2019, commenting on Plaintiff's conditions and limitations. Tr. 547-51. He
7 noted Plaintiff's diagnoses included PTSD, panic disorder with agoraphobia, OCD,
8 and major depressive disorder, with her most severe symptoms including anxiety,
9 depressed mood, obsessions and compulsions. Tr. 547-49. He opined she had
10 moderate-to-marked or marked limitations in almost every area of work-related
11 functioning, and predicted she would likely be absent from work more than three
12 times per month were she to work. Tr. 550-51.
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16 The ALJ found this opinion to be unpersuasive, finding it was not fully
17 supported by Dr. Mahler's own treatment records, that Dr. Mahler provided cursory
18 explanations, and that he appeared to have relied on Plaintiff's self-reports. Tr. 28.
19 The ALJ further found Dr. Mahler's opinion was not consistent with the record as a
20 whole, noting his opinion that Plaintiff seemed sad and never smiled was
21 inconsistent with other providers' observations of Plaintiff being able to joke
22 appropriately or relating some enjoyable experiences. *Id.* The ALJ also discounted
23 Dr. Mahler's opinion based on evidence that Plaintiff was not taking the indicated
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1 amount of her medication until well after the date last insured, and thus was not
2 receiving the benefit of the prescribed dosage. *Id.*

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4 Plaintiff makes the same arguments regarding Dr. Mahler as she did regarding
5 Dr. Wertz, additionally noting that the comments about medication dosage ignored
6 Plaintiff's medication phobia, and arguing that the ALJ did not find Plaintiff's
7 noncompliance to be material to her disability or otherwise explain how the dosage
8 was relevant to the treating source opinion. ECF No. 19 at 4-7. Defendant argues the
9 ALJ reasonably considered the consistency and supportability of Dr. Mahler's
10 opinion and reasonably considered the discrepancy in medication dosage evidence
11 to undermine the reliability of Dr. Mahler's opinion. ECF No. 23 at 9-11.

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13 The Court finds the ALJ erred. While she discussed both the supportability
14 and consistency factors, her discussion is not supported by substantial evidence. In
15 support of her conclusion that Dr. Mahler's records did not provide full support for
16 his opinion the ALJ noted the mental status findings were relatively benign but failed
17 to explain why the findings were insufficient to support his opinion. Dr. Mahler's
18 records contain notes of depressed and anxious mood; anxious, restricted and
19 dysphoric affect; ongoing worry, panic, obsessive thoughts and compulsions; and
20 lack of energy and motivation. Tr. 700, 708-09, 718-19. While the records contain
21 some normal findings, it is not clear that the findings that were abnormal were
22 insufficient to support Dr. Mahler's opinion.

1 With respect to the explanation offered, the ALJ found Dr. Mahler provided
2 cursory explanations that were not consistent with the observations from the visits
3 in 2018. Tr. 28. However, Dr. Mahler completed his opinion in July 2019, and the
4 records in the preceding months included notes of anxious, dysphoric, stressed, or
5 restricted affect; anxious or depressed mood; ongoing obsessive thoughts and rituals;
6 and reports of panic attacks and lack of motivation, consistent with his explanation
7 in the opinion. Tr. 728, 733, 742, 751, 769-70, 775, 779. Doctor Mahler's treatment
8 notes from the day he completed the opinion form include additional explanation for
9 his opinion, including his statement that Plaintiff "has severe anxiety in many
10 settings, and this prevents her from focusing on tasks that need completing, from
11 processing and remembering instruction to follow and from tolerating social
12 interactions necessary in most jobs." Tr. 780. Therefore, the Court finds the ALJ's
13 analysis is not supported by substantial evidence.
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19 The ALJ additionally discounted Dr. Mahler's opinion because it indicated
20 Plaintiff was on 40mg of Citalopram, but she had not reached this dose until well
21 after the date last insured. Tr. 28. The Court finds this is not relevant to the
22 persuasiveness of Dr. Mahler's opinion. With this increased dose by mid-2019, Dr.
23 Mahler still felt Plaintiff's condition was disabling. It is illogical for the ALJ to imply
24 that the opinion was less persuasive as of the date last insured because Plaintiff was
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1 not receiving the full benefit of medication; this presumably would have meant her
2 conditions were *more* limiting prior to the increased dosing.²

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4 Finally, the ALJ found Dr. Mahler’s opinion was not generally consistent with
5 the record as a whole, citing as an example that Dr. Mahler indicated Plaintiff
6 seemed sad and never smiled, but other providers had observed her to joke and she
7 had related some enjoyable experiences. Tr. 28. The Court finds this explanation
8 does not constitute substantial evidence, as the ALJ noted only three incidents in the
9 record where Plaintiff was noted to have “joked appropriately” with Dr. Wertz, Tr.
10 23 (citing Tr. 603, 659, 668), the most recent of which was in July 2018. While ALJs
11 must rely on examples to support their findings, the data points they choose must
12 constitute examples of a broader development. *Garrison v. Colvin*, 759 F.3d 995,
13 1018 (9th Cir. 2014). The fact that a person suffering from depression makes some
14 improvement “does not mean that the person’s impairment[] no longer seriously
15 affect[s] [his] ability to function in a workplace.” *Holohan v. Massanari*, 246 F.3d
16 1195, 1205 (9th Cir. 2001). The Court finds the few notations of Plaintiff relaying
17 positive experiences is not representative of the record as a whole, given her more
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26 ² If the ALJ felt Plaintiff’s failure to comply with prescribed medication was
27 material to a finding of disability, then there were additional findings that she was
28 required to make. Social Security Ruling 18-3p.

1 consistent reports of depression, obsessive thoughts, and panic attacks, as discussed
2 above.

3 The ALJ's discussion of Dr. Mahler's opinion is not supported by substantial
4 evidence. On remand, the ALJ will reconsider the opinion.
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6 **c. State Agency Doctors**
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8 Plaintiff argues the ALJ gave undue weight to the state agency non-examining
9 doctors, noting they reviewed the file before it contained the treating opinion
10 evidence, and asserting the ALJ failed to give sufficient reasons for favoring these
11 opinions. ECF No. 19 at 9.
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13 As this claim is being remanded for further consideration of the other
14 opinions, the ALJ shall also reconsider the persuasiveness of the state agency
15 opinions along with the other medical evidence and opinions.
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17 **2. Plaintiff's Subjective Allegations**
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19 Plaintiff contends the ALJ erred by improperly rejecting her subjective
20 complaints. ECF No. 19 at 9-15.
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22 It is the province of the ALJ to assess the claimant's allegations. *Andrews v.*
23 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
24 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
25 Cir. 1990). Once the claimant produces medical evidence of an underlying medical
26 impairment, the ALJ may not discredit testimony as to the severity of an impairment
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1 merely because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d
2 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's
3 reasons for rejecting the claimant's testimony must be "specific, clear and
4 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*,
5 81 F.3d 821, 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ
6 must identify what testimony is not credible and what evidence undermines the
7 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918
8 (9th Cir. 1993).

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12 The ALJ concluded Plaintiff's medically determinable impairments could
13 reasonably be expected to cause the alleged symptoms; however, Plaintiff's
14 statements concerning the intensity, persistence and limiting effects of those
15 symptoms were not entirely consistent with the medical evidence and other evidence
16 in the record. Tr. 22. The ALJ found Plaintiff's allegations were not supported by
17 the objective mental status exam findings and were undermined by inconsistent
18 reports of symptoms, evidence of improvement with treatment, Plaintiff's
19 noncompliance with treatment and failure to seek treatment at times, inconsistent
20 statements, and her activities. Tr. 22-26.

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24 Here, the Court finds that the ALJ did not err. The ALJ specifically discussed
25 several of Plaintiff's activities that were inconsistent with her allegations and
26 identified multiple inconsistent statements by Plaintiff. Furthermore, the ALJ noted
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1 Plaintiff's history of noncompliance with recommended treatment, as well as lack
2 of treatment for Plaintiff's alleged symptoms. Though the ALJ clarified that Plaintiff
3 ultimately corrected her misstatements, the Court agrees with the ALJ that Plaintiff's
4 inconsistent statements, in addition to the other contradictory evidence described
5 above, erode the reliability of her reports. In totality, the ALJ's discussion constitutes
6 specific, clear and convicting reasons for rejecting Plaintiff's testimony.
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9 **3. RFC**

10 Plaintiff argues the ALJ erred in formulating an RFC that does not account for
11 her limitations with respect to concentration, persistence, and pace. ECF No. 19 at
12 15-18. Because this claim is being remanded for further consideration of the medical
13 evidence, the ALJ shall also reconsider the RFC and whether any additional
14 limitations are warranted.
15

17 **CONCLUSION**

18 Plaintiff argues the decision should be reversed and remanded for the payment
19 of benefits. ECF No. 19 at 18. Under Ninth Circuit law, the Court had the discretion
20 to remand a case for additional evidence and findings or to award benefits. *Smolen*
21 *v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The commentary accompanying the
22 2017 revisions to the rules for assessing medical opinions made clear that "it is never
23 appropriate under our rules to 'credit-as-true' any medical opinion" and specifically
24 mentioned that the Ninth Circuit rules were not being adopted in the new regulations.
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1 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
2 168819, Fed Reg. Vol 82, No. 11 5858-60 (Jan 18, 2017). The Court therefore finds
3 that remand for further proceedings is the appropriate remedy here.
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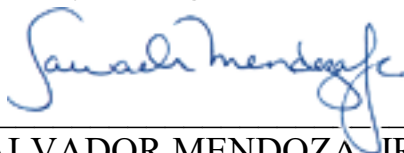
5 The ALJ's decision with respect to the medical opinion evidence is not
6 supported by substantial evidence, though he did not err in his decision with respect
7 to Plaintiff's subjective statements. On remand, the ALJ shall reevaluate the record
8 consistent with this Order.
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10 Accordingly, **IT IS ORDERED:**
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- 12 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **GRANTED**
13 **IN PART**.
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15 2. Defendant's Motion for Summary Judgment, **ECF No. 23**, is **DENIED**.
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17 3. The matter is **REMANDED** to the Commissioner for additional
18 proceedings consistent with this Order.
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20 4. The Clerk's Office is directed to **ENTER JUDGMENT** and **CLOSE**
21 this file.

22 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
23 provide copies to all counsel.
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25 **DATED** this 17th day of August 2022.

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28 SALVADOR MENDOZA, JR.
United States District Judge